Supreme Court, U.S.
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No. 09A440

IN THE
SUPREME COURT OF THE UNITED STATES

BHUPENDRA K SHAH- PETITIONER
vs.
THE NYS DEPARTMENT OF CIVIL SERVICE, NYS OFFICE OF MENTAL HEALTH AND NATHAN KLINE INSTITUTE FOR PSYCHIATRIC RESEARCH- RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER

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Date: February 25, 2010

QUESTIONS PRESENTED

1. Given the controversies among the Courts of Appeals in a Title VII retaliation claim in the context of failure-to-hire, what should be the standard for establishing causal connection, which is an element of prima facie case, between the protected activity and the adverse employment action?

2. Did the Court of appeals err when it overlooked the petitioner's accrued "Equal Protection" claim of the 14th Amendment to the constitution and the Statutory claim?

LIST OF PARTIES

There are no parties to the proceedings other than those listed in the captioned.

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OPINION BELOW

The opinion of the Court of Appeals (App. 1 - 6) is not yet been reported. The denial of petition[1] for a rehearing is not reported but is attached as App. 47-48. The opinion and order of the district judge granting summary judgment in favor of respondents is attached as App. 7-46.

JURISDICTION

The Second Circuit filed its decision on June 30, 2009 and filed its order denying petitioner's petition for a rehearing on October 8, 2009. This Court has jurisdition under 28 U.S. C. § 1254(1) to review the circuit court's decision on a writ of certiorari.

[1] After filing a petition for rehearing en banc, the petitioner filed a motion to amend his petition, which was granted after his en banc petition was denied. It was a bureaucratic clerical mix up within the court system.

STATUTORY PROVISION INVOLVED

42 U. S. C § 2000e- 3(a)

"It shall be an unlawful employment practice for an employer to *discriminate against* any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this sub chapter, or because he has made a charge, testified, assisted, or participated in an investigation, proceeding, or hearing under this sub chapter." §2000e- 3(a) (emphasis added).

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STATEMENT OF FACTS

The petitioner ("Petitioner") is a nonwhite male who was employed as "Principal Research Scientist Gr. 32 (Biometrics)" on a permanent but half time basis on 04/12/73. In early 1973, the Petitioner received a Research Grant from the National Institutes of Health[2] to perform Biometrics research. In the spring of1973, the petitioner was invited to participate in the symposium

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[2] The district court failed to report the "whole truth" of Petitioner's qualifications in his opinion and order (App. 12-13.)

to be held in Germany in September 1973. There were thirty two-world famous psychiatrists from western countries and the petitioner was the only scientist.Even though several Principal Research scientists were working for a long time, none of them were invited at the prestigious symposium(Emphasis added). Even though the petitioner was able to bring money and made significant progress in psychiatric research, which prompted world famous psychiatrist to invite him at the prestigious Symposium, the employer failed to provide him a full time position. Instead, the agents of NKI conspired between themselves and coerced Petitioner to resign from his existing half time State position, so that they can offer that position to a white employee. (Second Am. Complaint ¶ 6.1.) For fear of retaliation (i.e., receiving poor performance evaluation or unfavorable references for future employment) oyment), the petitioner resigned on June 20, 1973. On or about June 20, 1974, he was appointed to the position "Principal Research Scientist Gr. 32 (Biometrics)" on a temporary basis. By memorandum dated January 23,1975, NKI informed the petitioner that "Your State item is officially 'Associate Research Scientist' Grade 30.[3]" (Second Amended

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[3] Pursuant to 1976 reorganization of research scientist series , all positions of "Principal Research Scientist (various specialities) Gr. 32" and "Associate Research Scientist (various

Comp.¶ 6.1.) During November 1976, the NKI knew that layoffs were imminent. Since the Petitioner had a seniority in the specialty designation of Biometrics, Dr. Kohn's position was vulnerable to a layoff as per N.Y. Civil Service Laws. But to save his job, the respondents manipulated Dr. Kohn's specialty designation at the last minute and laid off the petitioner(Second Amended complaint ¶ 6.2.) Later, the employer restored his job after the legislators restored NKI's budget. In 1983, again there was a layoff. Again, the employer targeted the position of the petitioner for a lay off and eventually laid him off in May 1983. The Petitioner was convinced that his employer has always treated him differently in hiring and layoffs even though he was able to bring money and fame for the employer. So he decided to file a complaint of discrimination with the Equal Employment Opportunity Commission ("EEOC"). On or about July 26, 1983 , he filed a verified complaint (charge No. 021-83-3586.) When the respondents learned about the charge, Mr. George Nagle, who had the decision making authority, threatened the petitioner by stating that "we will give you bad recommendation for your would-be employer so that you never get employed in America."

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specialties) Gr. 30" were converted to "Research Scientist (various specialities) Gr. 31."

Immediately, the petitioner called EEOC who advised the petitioner to file a charge of retaliation. So on September 30, 1983, the Petitioner filed a charge of retaliation (charge # 021- 84-0017) with the EEOC.

In the pursuit of gaining information about his 1983 lay off, the petitioner filed several unsuccessful law suits in between 1986-90. In the veil of Secrecy, he was unable to receive any information about how many laid off employees were rehired or reinstated after the 1983 layoff.

On or about February 22, 1990, the Petitioner filed a verified complaint with the N.Y. State Division of of Human Rights and the Equal Employment opportunity Commission("DHR/EEOC"). On Dec. 22, 1994, the petitioner filed the instant action, alleging employment and retaliation in violation of, inter alia, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et Seq. (2000) ("Title VII"). The petitioner alleged that he was denied a position of Director of Quality Assurance ("DQA") and that respondent NKI's non hiring of him as a research scientist in the period of 1991 through 1994 constitutes retaliation in violation of Title VII for his filing 1990 complaint. The petitioner claimed that he was qualified for a position of research scientist

in the specialty of Biometrics, Biostatistics, Computer Science , Epidemiology, and Nuclear Medicine. He also claimed that in between March 1992 and December 1992, respondents' attorney had accidently revealed "that defendant NKI has refused to rehire you." (Second Am. Compl. ¶ 10.) In Burlington Northern & Santa Fe Railway v. White. 548 U.S. 53 at 67-68 (2006), the Court considered employer's refusal to hire as a materially adverse action.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD RESOLVE THE SPLIT AMONG THE CIRCUITS IN A TITLE VII RETALIATION CLAIM AS TO WHAT SHOULD BE THE STANDARD FOR ESTABLICING CAUSAL CONNECTION - AN ELEMENT OF PRIMA FACIE CASE- BETWEEN THE PROTECTED ACTIVITY AND ADVERSE EMPLOYMENT ACTION IN THE CONT- EXT OF FAILURE- TO- HIRE .

(I.A) On the issue of conflicts among the circuits.

(a) The Second Circuit's precedent of temporal proximity as a means to establish causal connection.

Here, the district court and the parties had agreed that the three prongs test of Ruggles v. California Poly-

technic State University, 797 F. 2d 782 (9th Cir. 1986) is an appropriate case law for establishing prima facie case of retaliation in the failure to hire context. In fact, the district court applied the first two elements of the three prongs test of Ruggles'(supra) to establish prima facie case of retaliation in the failure to hire context. But, instead of applying the required the third element of "but for" test under Ruggles (supra), the district judge and the panel applied a temporal proximity criterion as a means to establish causal connection between the protected activity and the adverse employment action. For the following reasons, the application of a temporal proximity criterion is not appropriate to the fact of the (here, failure to hire) the instance case:

The temporal proximity criterion has roots in retaliatory discharge or firings. Since the employer has authority over the current employee, who has filed a complaint with EEOC, it has a far more opportunity to retaliate against him than in any other settings. However, such an opportunity seldom exists in retaliatory failure to hire context (emphasis added). The reason being that the employer had either abolished the position or appointed someone else in the position held by the fired employee. This makes it impossible for an employer to take any retaliatory action against a former empl-

oyee who has filed a complaint. The first and foremost opportunity to retaliate against such an employee is when legislators approve the budget to hire or fill new positions. This process may take months or years from the time of filing a complaint by a former employee in order to take adverse employment action. Therefore, it is absurd to apply a temporal proximity criterion as a measure of "causal link" between the protected activity and the adverse employment action in the context of retaliatory failure to hire. Therefore, the panel erred.

(b) Ninth Circuit's formulation for establishing causal connection in the context of retaliatory failure to hire.

(i) Absence of immediacy does not disprove causation:

It is important to emphasize that it is causation, not temporal proximity itself, that is an element of prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation. In Porter

v. California Dep't of Corr. 419 F. 3d 885 (9th Cir. 2005), the Ninth Circuit employed similar analysis. The plaintiff in Porter brought a suit alleging that she was retaliating against because she complained about sexual harassment. *Id.* at 887. In 1995, the plaintiff reported her complaints, but the alleged retaliation —— the denial by the plaintiff's alleged harasser of her various requests for transfers —— did not occur until 1998. *Id.* at 887-89. Quoting the Third Circuit's decision in Kachmar v. SunGard Data Sys., Inc., 109 F.3d 173, 177 (3d Cir.1997), the Ninth Circuit concluded that the multi-year gap between the plaintiff's protected activity and the adverse employment actions did not defeat a finding of a causal connection because the plaintiff's harasser did not have the opportunity to retaliate until he was given responsibility for making personnel decisions. *Id.* This is exactly what the petitioner has stated in the previous section as well as during the oral argument.

(ii) But for test for causation:

In Wrighten v. Metropolitan Hospitals, Inc, 726 F. 2d 1346 (9th Cir. 1984), the Ninth Circuit Court of Appeals has set forth the following three elements of a prima facie case for retaliatory discharges or firings:

(1) that the plaintiff was engaged in a protected activity; (2) that he or she suffered an adverse employment decision, and (3) that there was a causal link between the protected activity and the adverse employment action. The causation element in retaliatory termination cases requires the plaintiff to show "by a preponderance of evidence that engaging in the protected activity was one of the reasons for the firing and that but for such activity the plaintiff would not have been fired." Kaufman v. Sidereal Corp. 695 F. 2d 343, 345 (9th Cir. 1982.)

In Ruggles v. California Polytechnic State University, 797 F. 2d 782 (9th Cir, 1986), the Ninth Circuit held that in the failure-to-hire context involving a claim retaliation, plaintiff meets her prima facie burden by showing that (1) she engaged in protected activities, (2) the position was eliminated as to her, and (3) that the position was eliminated as to her because of the protected activities.

It is clear from the Ninth Circuit's cases of 1982 and 1986 that temporal proximity criterion is not required to establish a causal link and that analysis based on "but for" test is necessary to establish a causal link between the protected activity and adverse employment decision regardless of retaliatory firings or retaliatory

failure-to-hire.

Application of "but for" test to the instant case:

(i) The 1976-1977 layoff. :

In 1973, the employer coerced the petitioner to resign. The petitioner resigned for fear of retaliation Brake Retaliation, 90 Minn. L. rev. 18, 20 (2005), and didn't file any complaint. Later, the employer rehired him in a lower position. There was a layoff in 1976-77. Since the petitioner had a seniority in the "Research Sc. V (Biometrics)" position, he was not vulnerable to a layoff. However, Dr. Kohn was vulnerable to a layoff, but the employer manipulated his specialty designation and laid off the petitioner. Though the petitioner was upset about Title VII offenses , he remained quiet as well as loyal to the employer and didn't file any complaint. As a result of his undivided loyalty, the employer immediately rehired him when the budget was restored in 1977.

(ii) 1983-layoff:

In 1983, there was a layoff. Again, as usual the respondents targeted petitioner's position for a layoff

and laid him off. After his 1983 lay off, the petitioner filed a Title VII complaint and a subsequent retaliatory charge on September 30, 1983 with the EEOC.

To establish a denial of Equal Protection, a plaintiff must prove existence of an intentional or purposeful discrimination by authorities in which one class is favored over another. Bohus v. Board of Election Com'rs, C. A. Ill. 447 F. 2d 821 (7th Cir. 1971.) Here, the employer retaliated by denying him the benefit of statutory right provided in N.Y. Consolidated Law Service ("CLS") Civil Service Law ("CSL") §81. For instance, (i)Respondents rehired two white employees (Ms. Saederup and Ms. Hashim), who were laid off along with the petitioner in 1983, within two years from their 1983 layoff, but they didn't provide the same or similar benefit of CLS Civil Service Law § 81. (ii) Respondents failed to hire the petitioner as required under CLS Civil Service Law § 81 when Ms. Wolfe retired from her position of "Research Sc. V (Biometrics)" on May 28, 1984 (See Appendix pages A021-A022 submitted to the Court of Appeals. Hereinafter, appendices and exhibits filed with the Court of Appeals and the district court are referred to as "court papers.") Therefore, the employer deprived the petitioner the benefit of equal protection

of laws. (See section II infra for more details).

(iii) Testified on November 1, 1989:

A pattern of retaliatory harassment could rise to the level of Title VII violation in certain situations. Spector v. Bd. of Trs. 316 Fed. App. 18, 2009 U.S. App. Lexis 5700 (2d Cir. Conn. 2009).

Here, on or about November 1, 1989, the petitioner testified in the Title VII proceedings of a fellow employee. And on or about February 22, 1990, he filed a complaint of discrimination with DHR/EEOC. In between March 1992 and December 1992, the respondents' attorney conceded to the petitioner that they will not rehire you. White (Supra). Because the petitioner testified in the Title VII and filed a verified complaint, the respondents intentionally didn't create any appropriate position for him or rehired him into the positions of Dr. Vitrai or Dr. Hannon or Dr. O'Neil or Mr. Malyszek.

The above undisputed evidences support that the petitioner was not rehired from his 1983 layoff until the present time because of his various protected activities in 1983, 1989, 1990 and 1994. The district court

and the panel overlooked the pattern of retaliatory harassment.

(c) Sixth Circuit formulation of Causal connection

In Dixon v. Gonzales, 481 F.3d 324(6th Cir.2007), the defendants argued that temporal proximity does not exist because ten years elapsed between Dixon's complaints to Davis regarding Reutter's discriminatory treatment of African-Americans and the FBI's decision to not reinstate. Dixon argued that the district court erred by focusing narrowly on the ten-year period that elapsed here and failing to take into account the surrounding facts. In particular, Dixon argued that a finding of causal connection is not foreclosed because Reutter did not have the ability to retaliate against him until Reutter's views on Dixon were solicited during the FBI's reinstatement investigation. Dixon claimed that from the time Reutter was removed from his position in the Applicant Program in 1982 until Dixon left the FBI in 1988, Reutter "had no authority or supervisory power over [Dixon] and was not in a position to legitimately interfere with [his] employment." Dixon argued that Reutter retaliated against him at the first opportunity he had and as such, the lack of temporal proximity between Dixon's 1982 complaint and Reutter's 1992 reco-

mmendation does not break the causal link between Dixon's protected activity and the denial of his reinstatement to the FBI.

The Sixth Circuit Court of Appeals agreed with Dixon and held that mere lapse in time between the protected activity and the adverse employment action does not inevitably foreclose a finding of causality. This is especially true in the context of a *reinstatement* case, in which the time lapse between the protected activity and the denial of reinstatement is likely to be lengthier than in a typical employment-discrimination case.

Since, the Dixon's circumstances are nearly the same as that of the petitioner's case, the panel erred when it applied the temporal proximity criterion as a measure to find causal links between the 1990 protected activity and each adverse employment action it took between February 1990 and December 1994.

(d) Third Circuit's formulation of Causal connection:

In Kachmar v. SunGard Data Sys. ,Inc.,109 F.3d 173, 177 (3d Cir.1997), the Third Circuit emphasized that causation is a fact-specific inquiry and is not redu-

cible merely to a measurement of temporal proximity. It is important to emphasize that it is causation, not temporal proximity itself, that is an element of plaintiff's prima facie case, and temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific. When there may be valid reasons why the adverse employment action was not taken immediately, the absence of immediacy between the cause and effect does not disprove causation.

Here, the valid reason for lack of immediacy between the filing of instant complaint and the adverse action (which in this case is "failure to hire") is that there were no positions available unless and until the legislators approve new positions. For instance, in 1992, 1993 and 1994, the legislators respectively approved two, four and twenty-one positions, without level and specialty designations. Each new position creates a lack of immediacy between the filing of 1990 complaint and adverse employment action. Therefore, there was a valid reason why the adverse action was not taken immediately after filing of DHR/EEOC complaint in February 1990. The following section provides highly context- specific inquiry into the motive of the employer to

establish causal connection.

Motive Analysis:

Here, the court record supports that petitioner had loyalty to respondents from 1973 through 1983. For instance, (a) The petitioner remained loyal and didn't file any complaint when he was coerced in 1973 to resign from his permanent half time position;(b) Again, he remained loyal and didn't file complaint when he was laid off in1976 in violation of Civil Service Laws, and (c) even though the petitioner was able to bring money and more fame to the employer, he was unjustly laid off in 1983. Your honor, no employer would even think of laying off or not rehiring an employee who was able to bring money and fame to the organization. The above facts support that the only motive of the employer was to punish the petitioner for filing the complaints of discrimination and retaliation after his 1983 layoff.

(e) Fifth Circuit's formulation of causal connection:

Concerning proof of direct evidence, which is an element of causation, the panel concluded: "There was no direct evidence of retaliatory intent." Although the proof of "direct evidence" was in the court records, the

panel based it as "insufficient or inconsistent" with the prior precedent of the Second Circuit. Regarding what constitutes "direct evidence," the precedent in the Fifth Circuit support a conflict between the circuits:

With regard to what constitutes "direct evidence," the court in Fabela v. Socorro Indep. Sch. Dist. 329 F. 3d 409 (5th Cir. 2003) held that "statements or documents, which show on its face that an improper criterion served as a basis - not necessarily the sole basis, but a basis - for the adverse employment action is direct evidence of discrimination[4]. It emphasized that to successfully establish the element of causation in the direct evidence rubric, Fabela's evidence does not have to support the conclusion that retaliation was the only motive or even that it was the determinative motive, only that it was among the motivating factors which led to the adverse action. Fierros v. Tex. Dep't of Health 274 F. 3d 187, 192 (5th Cir. 2001); Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L.Ed. 2d 268 (1989).

Here, the fact in question is whether the decision of the respondents not to hire petitioner was motivated, in part, by the fact (a) that the petitioner previously

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[4] Page limitations prevents to discuss the Fabela's case fully .

filed EEOC complaints in 1983; (b) that in September 1983, the respondent threatened that "we will give you bad recommendation for your would-be employer so that you never get employed in America", and (c) that in1992, which is the time between filing of filing EEOC complaint in February 1990 and the filing of complaint in December 1994, the attorney conceded by reiterating that respondents will not rehire you, which amounts to a materially adverse action within the meaning of White (supra). It is obvious from the court records that (a) the employer's 1983 threat of punishing the petitioner for filing complaints (b) their fraudulent statements to conceal their 1983 threat, and (c) the reiteration of the 1983 threat in 1992 were among the motivating factors which led to the adverse actions from 1990 through 1994. Therefore, a reasonable jury, passing in this evid- ence alone, would indeed conclude that the petitioner was not rehired after 1983 to the present time, because he filed DHR/EEOC complaints in 1983 and 1990 and testified in 1989. This establishes direct evidence.

(I.B) On nondiscriminatory reasons as pretext:

Since there was no prima facie case as per its precedent, the panel - without reviewing the merits

of the pretext issue - concluded that "Plaintiff has provided insufficient evidence that those proffered reasons were not credible and were a pretext for retaliation." For the following reasons, the panel's finding is **clearly erroneous** :

(1) Perjury about Dr. Vitrai's qualifications:

The panel blindly followed what was submitted by a party represented by an attorney and failed to follow what was submitted by the *pro se* party (i.e., the panel reviewed those evidences that fitted its hypothesis.) For instance, the panel and the district judge[5] blindly followed the following evidences submitted by the attorney: (a) In his affidavit, Dr. Kohn claimed that Dr. Vitrai had a Ph.D. in Biometrics; (b) that Dr. Vitrai was hired because he was an experienced scientist with a record of accomplishments in the field of electroencephalography ("EEG") and (c) that the petitioner did not have the requisite credentials or training or experience. In his reply Aff. Ex. B, Attorney Rosenzweig had stated that Dr. Vitrai's specialty is Biometrics. In her

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[5] The panel and the district judge failed to determine whether the sworn statements of Dr. Kohn et al has "a reliable basis in the knowledge and experience of [the relevant] discipline." Daubert v. Merrell Dow Pharm. Inc. 509 U.S. 579 at 592.

Affidavit, Ms. Portnoy has claimed: "Dr.Vitrai brought highly specialized talents to the position he filled as he was both a Biometrician and an experience electrophysiologist."

Your honor, the court record supports that all the above claims were false. For instance, after the decision rendered by the district judge, the petitioner contacted the university officials about the qualifications of Dr. Vitrai. The E-mails (see the court records) from the officials of Etoves Lorand University support that Dr.Vitrai didn't receive "Ph.D." degree as claimed and that the title of his diploma thesis was in computer science and not in"EEG" or "Biometrics" as claimed. In addition, Dr. Kohn misled the court by stating in his affidavit that Dr. Vitrai was hired because he was an experienced scientist who had a record of accomplishments in the field of electroencephalography ("EEG") and that Dr. Vitrai was specifically recruited to partcipate in a research protocol at NKI (Kohn Aff. ¶ 9). Your honor, the E-mail (see the court record) from Dr. Yar indicated that he was not involved in EEG studies. In addition, in order to conduct EEG studies on mental patients, it is required to have approval from the Institutional Review Board before conducting EEG or any research studies on mental patients. Even though the

Institutional Review Board has not granted its approval to conduct EEG studies on mental patient for many years, Dr. Kohn et al misled the district court by stating that Dr. Vitrai was hired because of his highly specialized talents in EEG on ongoing projects at NKI.

The above undisputed facts support that Dr. Kohn, Ms. Portnoy and the Attorney defrauded the court and obstructed justice by knowingly submitting false statements under an oath.

In St. Mary's Honor Center v. Hicks, 509 U.S. 502, 125 L.Ed. 2d 407, 113 S. Ct. 2742 (1993), this Court held that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Reeves v. Sanderson Plumbing Products Inc., 530 U.S. 133, 147 L.Ed. 2d 105, 120 S. Ct. 2097 (2000).

Here, applying the methodology of the Third, the Sixth and the Ninth Circuit's Court of Appeals to the hiring of Dr. Vitrai in 1993, the petitioner in fact has established the prima facie case of retaliation. Therefore, this Court should conclude that the employer has unlawfully discriminated or retaliated against the peti-

itioner and should consider taking appropriate action for defrauding the court.

(2) On the issue of nondiscriminatory reason that Dr. Vitrai was better qualified than Petitioner. :

(i) Your honor, pursuant to the definition or meaning of "Biometrics" as provided in Webster's Third New Int'l Dictionary 218 (1986), it is required to have " knowledge, skills and abilities" in statistics to study the Biological observations and phenomena. In fact, our government, the academic institutions, the laboratories and the drug industries employ scientists with education in "Statistics" to study biological phenomenon. In fact, the Food and Drug Administration ("FDA"), the Environmental protection Agency ("EPA") and the drug industries have recruited scientists with a degree in "Statistics" to study biological phenomenons. In fact, the Biometrics Division of the FDA has hired petitioner's student, who had earned a doctorate degree in Statistics under him, to study biological phenomenons. In addition, Dr. David Axelrod, the former Commissioner of the N.Y. State D'ept. of Health had requested the petitioner to study why cancer patients at the famous Rosewell Park Memorial Institute located in Buffalo were dying after receiving Bone Marrow transplants. First, this assignment to the petitioner in itself supports

that "knowledge, skills and abilities" in the field of "Statistics" is a necessary qualification to study biological phenomenon (see the definition of Biometrics in Webster's Third New Int'l Dictionary .) After extreme hard work (i.e., looking for a needle in a hay stack), the petitioner was able to find that aspergillosis disease, which is like a legionnaire disease, was responsible for the deaths. The Commissioner and the doctors agreed. The Commissioner transferred all the cancer patients to other unit. He directed to close the Bone Marrow transplant unit. Later, the petitioner heard from a fellow colleague that the news of closing the unit was reported on the front page of New York Times. Your honor, if the petitioner had no education and twenty years of experience in "Statistics," he would not have discovered the underlying biological reason why cancer patients were dying. Therefore, the court's finding that the petitioner is not qualified or better qualified than Dr. Vitrai - who did not have the required knowledge, skills, abilities in"Statistics" - is "**clearly erroneous**."

(ii) The district court blindly applied double standard in adjudicating the petitioner's qualifications for the position of "Research Sc. IV (Biometrics)." Here, the judge utilized Mr. Malyszek's prior experience in installing Developmental Research Imaging system as a

means to justify that he was qualified for the position of "Research Sc. V (Biophysics)," but he failed to apply the same logic (i.e., the petitioner's prior experience in Biometrics) to adjudicate the petitioner's qualifications. For instance, (a) The judge failed to consider that the respondents did employ the petitioner as a "Research Sc. V (Biometrics)," which is a higher level position than "Research Sc. V (Biometrics)," from 1974 until he was laid off from that position in1983. The district judge failed to consider that the petitioner had in fact significantly more years of experience in the speciality of "Biometrics" at the higher level of Research Scientist series (i.e., "V") than Mr. Vitrai, who didn't even had a Ph.D. degree and the necessary "knowledge, skills and abilities" in statistics to study biological phenomenons. How can a reasonable person would conclude that a person who had satisfactorily performed the duties of "Research Sc. V (Biometrics)" for more than nine years is not qualified to perform the duties of a lower level position of "Research Sc. IV (Biometrics)?" This is absurd and clearly erroneous. (b) The district judge failed to consider that our own top respected American Scientists had provided federal money to the petitioner to pursue Biometrics Research. (c) The district judge failed to consider the honor bestowed upon the petitioner when he was among the thirty-two participants

in a prominent symposium held in Germany. (d) In addition, the district judge failed to apply the hiring standard of the N.Y. State Dept. of Civil Service for the position of "Research Sc. V (Biometrics)." For instance, for the position of Research Sc. IV (any major field)," it is required that a candidate must have a doctorate degree in the appropriate major field (here "Biometrics" or "Statistics") and two years of such experience. Here, assume for the time being that what is stated in the Dr. Vitrai's CV is true. His CV indicates that he had a combined Ph.D. degree in "Biometrics and Physiology" from Etoves Lorand University and not "University of Budapest" as ascertained by the District Court. The district judge failed to consider that a joint Ph.D. degree in Biometrics and Physiology is not the same as a Ph.D. in Biometrics alone. (e) The court record supports that Dr. Vitrai has not published a single scientific paper in "Biometrics" and "Biometrika," which are the most respected peer reviewed journals in Europe, America and around the world. In stark contrast, the petitioner had published at least eight research papers in these two journals from 1962 through 1976. (f) Your honor, the top American Scientist, who has received twenty seven honorary Ph.D. degrees and who was honored by the former U.S. President George Bush, stated in his letter that " your idea is new and great

potentialities." Since the judge had blindly ignored the above facts submitted by the petitioner, it is **absurd** to conclude that Dr. Vitrai was better qualified for the position of " Research Sc. IV (Biometrics) than the petitioner.

(3) Was Mr. Malyszek better qualified than petitioner?:

The district judge didn't comprehend the technical meaning of "installing a device" as well as hiring standard set forth in the Classification standard of the N.Y. State Dept. of Civil Service (Occ. code 6162000). As a result, the court erred. For instance, installation of Developmental Research Imaging system is a one time job for a technician and not a job for a scientist. It is like installing a Dish Cable Net work TV in a home or installing software in a computer. With regard to hiring a research scientist, the N.Y. State Department of Civil Service has established a classification standard for hiring a person in Research Scientist series. According to the classification standard for the position of "Research Sc. V (Biophysics)," a candidate must have a doctorate degree in Physics and three years of professional research experience in Biophysics or a master's degree in Physics and five years of experience in Biophysics." Here, Mr. Malyszek had a Bachelor degree

in "Biochemistry," which is a field not related to Mathematics or Statistics or Physics. Therefore, Mr. Malyszek's appointment to the position of "Research Sc. V (Biophysics)" is inconsistent with the official standard of the Department of Civil Service. In contrast, the petitioner had earned two Ph.D. degrees in Statistics," which has applications in the field of "Physics" (Albert Einstein applied statistical methods to prove its theory in one of his famous research paper co-authored by Bose.) The court record supports that the petitioner was appointed as a "Director of Nuclear Medicine," which requires a higher level of qualifications than "Installation of a Developmental Research Imaging system," and was a full member of "Society of Nuclear Medicine." The privilege of becoming a "full member" is not extended to all scientists without proper credentials such as a Ph.D. degree and a number of research papers published in a peer reviewed journals. Your honor, the petitioner was able to apply statistical methods to discover that the nuclear device is not suitable for clinical use. The Health Care Financing Agency ("HCFA") of the U.S. Government published in Federal Register that it will not reimburse money for bone scans done by DP3 (a Nuclear Device measuring bone density). If the petitioner had no Knowledge, Skills or Abilities in statistics, he would not have disco-

vered this serious error which could result in misdiagnosis of Osteoporosis. The foregoing fact supports that the petitioner was better qualified for the position of "Research Sc. V (Biophysics)" than Mr. Malyszek. Therefore, respondents' articulated nondiscriminatory reasons were in fact pre textual.

(4) Was Dr. O'Neill more qualified than petitioner?:

The advertisement for the position held by Dr. O'Neill was for a Ph.D. level health economist with a strong econometrics background. (Respondents 56.1 ¶ 14.) Even though Dr. O'Neill had a degree in Economics, he was appointed to the position of "Research Sc. V, (Epidemiology)." Pursuant to the Classification standard of N.Y. S. Dept. of Civil Service, research scientists perform basic scientific investigations of phenomena or problems with applications in specialized subject matter fields in the medical, biological and behavioral sciences and that a candidate must have a doctorate degree in the appropriate field (here "Epidemiology.") In addition, N.Y. Consolidated Laws Service (CLS), Civil Service Law § 61(2) states that "No person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed .... " Here, since Dr. O'Neill, who is an Economist, had no "know-

ledge, skills and abilities" to perform the duties of Epidemiology, his appointment to the position of "Research Sc. V (Epidemiology)" was in fact inconsistent with CLS, Civil Service Law § 61(2) and the classification standard of the N.Y. State Department of Civil Service. Therefore, respondents' articulated nondiscriminatory reasons were not the true reasons but in fact were pre textual.

(5) Abolishment of Dr. Hannon's position as a pretext

With respect to the elimination of the position held by Dr. Hannon, respondents' legitimate nondiscriminatory reasons were: (1) that the position was abolished as a part of a state plan to reduce the workforce through early retirement incentives (Cancro Aff. ¶ 5 and Portnoy's Reply Aff. ¶ 5); (2) that once Dr. Hannon retired in March 1991, there was no budget item or position to fill because the position was abolished so that the facility would enjoy a budgetary reduction (Portnoy reply Aff. ¶ 5.) and (3) that the fact show that no scientist was hired in 1991. (Defs.' 56.1 ¶5.) For the following reasons their nondiscriminatory reasons were not the true reasons but a pretext of retaliation:

(i) The court records support that the petitioner was begging to the court for about three to four months to compel the respondents' to produce an explanation about what happened to Dr. Hannon's position after she retired. If there were no problem of providing an explanations, no one would hesitate to explain them promptly. Here, since the respondents dragged it for more than three months, it raised a doubt about the truthfulness of legitimate nondiscriminatory reasons offered by the respondents. For instance, in her Affidaavit Ms. Portnoy submitted a Ex.-A (a copy PR-75 form), which listed Dr. Hannon's specialty designation as "psychology." The purpose of submitting this form was to mislead the court and the petitioner by justifying that the petitioner was not any way qualified to perform the duties of "psychology." Your honor, Dr. Lajta's Affidavit and other court documents revealed that Dr. Dr.Hannon's specialty designation was in fact "Epidemiology" and not "Psychology" as claimed. (ii) Concerning their second argument that "the facility would enjoy a budgetary reduction," they would have enjoyed the same budgetary reduction without abolishing the position (see court records February 14, 1989 memo from the Department of civil Service). The reason being that the respondents could have kept the position vac-

ant which would enable them to fill the vacancy if and when the legislators approve the budget. In fact, the respondents did receive funding for two new positions in 1992. But they retaliated against the petitioner by not offering him the position even though they had the opportunities to do so in 1992 (applying the Sixth Circuit's criterion of reinstatement). (iii) Concerning their argument that no scientists were hired in 1991, it should be noted that the argument has no merit as there were no position available in 1991.

In addition, the respondents adopted a policy in 1983 "not to rehire the petitioner." For instance, they violated CLS-Civil Service Law §81 and the Equal Protection Clause of the 14th Amendment in order to keep their policy of "not to rehire the petitioner" during 1983-1987. They reiterated their policy in 1992 when their attorney conceded to the petitioner that the respondent NKI has refused to rehire you. see White (supra). Such an existing policy of refusal to rehire the petitioner support that the real motive for abolishing the Dr. Hannon's position in 1991 was to punish the petitioner for filing the complaints and for testifying on November 1, 1989 in a Title VII proceedings of a fellow employee and the elimination of Dr. Hannon's position was indeed a pretext of retaliation.

II THIS COURT HAS POWER TO SURVIVE A CAUSE OF ACTION FOR DEPRIVATION OF PETITIONER'S CONSTITUTIONAL RIGHTS.

(1) Facts of denial of Statutory & Constitutional rights:

(a) Here, the facts of constitutional and statutory (i.e., CLS - Civil Service Law § 81) claims are Inter-alia the same. In May 1983, three employees including the petitioner were laid off. Pursuant to CLS-Civil Service Law § 81, all the three laid off employees including the petitioner were entitled to be reinstated within four years from the date of layoffs if a position becomes available in their former title from which they were laid off, the court records support that prior to their 1983 layoff, Ms. Saederup (W) and Ms. Hashim (W) held the position of "Res. Sc. I (Biochemistry) and "Res. Sc. IV (Neurophysiology)" respectively. Pursuant to CLS - Civil Service Law §81, Ms. Saederup and Ms. Hashim were entitled to be reinstated in their positions if and when an opening of "Res. Sc. I (Biochemistry) and "Res. Sc. IV (Neurophysiology)" arose (see ¶ 3 of Dr. Cancro's Aff.) But the list of new positions submitted by the respondents during the discovery process supports that there were no openings for the positions of "Res. Sc. I (Biochemistry)" and "Res. Sc. IV (Neurophysiology)"

during 1983-1987. In order to provide preferred treatment to two white employees (Ms. Saederup was a wife of a senior scientist), respondents created "Res. Sc. I (Neurochemistry)" and "Res. Sc. V (Neurochemistry)" respectively for the exclusive benefit of Ms. Saederup (W) and Ms. Hashim(W). Although, the rehiring of Ms. Saderup is consistent with the CLS-CSL § 81, but Ms. Hasim's rehiring is not. Even though the legislators funded about fifty-one new positions from 1983 through 1987, the respondents failed to create any appropriate position for the petitioner similar to what they did for Ms. Saederup and Ms. Hashim. The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." F. S. Royster Guano Co. v. Virginia 253 U.S. 412, 415 (1920). Here, the above undisputable facts support that the respondents denied the petitioner the benefit of the statutory rights provided in CLS - Civil Service Law §81 and the Equal Protection Clause of the Fourteenth Amendment.

(b) During 1991-1994, respondents hired fifteen Americans and twelve foreigners with H-1B visa on a permanent basis without advertisement. In addition, they provided every person an opportunity to designate a specialty which most closely approximates the types of

research they will do (See ¶ 4 of Portnoy's Aff.). But respondents failed to create an appropriate position for the petitioner. In addition, respondents created a position of "Research Scientist IV (Biometrics)." Even though the petitioner was fully qualified to perform the duties of "Research Sc. IV (Biometrics)," (which is a lower level grade level in line of promotion than "Research Sc. V (Biometrics) from which he was laid off in 1983), the respondents hired Dr. Vitrai, who was a white foreigner with H-1B visa without advertisement. Pursuant to the Immigration and Naturalization act, an employer is only permitted to hire a foreigner with H-1B visa on a temporary basis(Emphasis added.) Here, respondents hired Dr. Vitrai and eleven other foreigners with H-1B visas on a permanent basis without advertisement. Since foreigners with H-1B visas do not have the same rights to compete for permanent jobs with American citizens, the respondents have not only deprived the rights of American citizens to compete for permanent full time positions but also intentionally deprived the rights of American minority applicants including the petitioner to compete for a position. It is undisputed that hiring without advertisement has adverse impact on minority applicants. And such an employment practice has been held unlawful under Title VII. The respondents had indeed treated the

the petitioner differently in hiring of fifteen citizens and twelve foreigners. Silva v. Vowell, C.A. Tex. 1980, 621 F. 2d 640, rehearing denied 625 F. 2d 1016, Certiorari denied. 101 S. Ct. 941, 449 U.S. 1125, 67 L.Ed. 2d 111.

In addition, the State is not required to dedicate its resources to citizens of other states and foreigners with H-1B visas alike." People v. Crane 214 N.Y. 154, at 161, 164, 108 N.E. 427 at 429, 430 (1915). Here, since the twelve foreigners were legally admitted to the United States, employers are only permitted to hire them on a "temporary basis" (see Immigration and Naturalization Act). Here, the respondents did the opposite and hired all foreigner (including Dr. Vitrai) on a permanent full time basis. Even though the petitioner, the twelve foreigners with H-1B visas and fifteen other U.S. citizens were all similarly situated persons in securing employment, the respondents had hired all of them except the petitioner. They indeed treated the petitioner differently when he was not rehired during 1991-1994. Therefore, the respondents have not only violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, but also the N.Y. Const. Art I, §11.

(2) Accrual of Cause of Action:

The standard rule that [accrual occurs] when the plaintiff has "a complete and present cause of action." Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferber Corp. of Cal. 522 U.S. 192, (1997). (Quoting Rawling v. Ray 312 U.S. 384 (1941)). A cause of action does not become "complete and present" until the plaintiff file suit and obtain relief. Reiter v. Cooper, 507 U.S. 258, 267 (1993). Here, the petitioner didn't file any suit asserting denial of his "equal protection" clause and § 81 of the Civil Service Law ("CSL"). Therefore, pursuant to Reiter (supra), he is entitled to file a suit or incorporate new claim in the instant case and obtain relief from them.

As to when a cause of action accrues, federal law governs the question of when a federal claim accrues. Under federal law, a cause of action accrues 'when the plaintiff knows or has reason to know of the injury that is the basis of the action." M.D., Mr & Mrs. D. v. Bd. of Educ., 334 F. 3d 217 (2d Cir. 2003) at 221-22 (quoting Leon v. Murphy, 988 F. 2d 303, 309 (2d Cir. 1993). All Circuit Courts of Appeals (except the 4th Cir. Court of Appeals as the issue didn't reach at the appellate level) have adopted and followed this stand-

ard. Here, the following facts support that when the petitioner came to know or had reasons to know that he was deprived of the benefits of "Equal Protection" clause as well as his statutory rights provided in CLS Civil Service Law § 81:

Only three out of about seventy-five employees of NKI (which is not a massive layoff as characterized by the district judge) were laid off in 1983. As of filing of his verified compliant, the petitioner had no knowledge about rehiring of Ms. Saederup and Ms. Hasim until he received a list of some employees under a court order on May 17, 2000 (please see the Court records). If the petitioner knew about the hiring of two laid off employees, he would have stated so in his complaint or have filed charges of violation of his constitutional rights before filing his complaint in 1994. So the limitation period for violation of both the Equal Protection Clause of the 14th Amendment and §81 of CLS- CSL begin to run from May 1983 and ends on May 16, 2004 (four years pursuant to CSL §81) [6] Since the complaint

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[6] It is immaterial which accrual dates (i.e., May 16, 2004 or the May 17, 2000) one considers, but the causes of action accrue as the complaint was filed on December 1994.

had been filed on December 22, 1994, the petitioner is entitled to incorporate both the constitutional and stat-utory claims in his complaint.

In Hill v. Forum Health et al, 167 Fed. Appx. 448 (6th Cir. 2006), the court held that "It is well settled that this court will not consider arguments raised for the first time on appeal unless necessary to avoid a miscarriage of justice. Here, at page 25-26 of his Memorandum of Law in opposition to respondents' motion for summary judgment, the petitioner had timely asserted his right provided in CLS Civil Service Law §81. On appeal, the petitioner did raise deprivation of both the statutory (i.e., CLS, Civil Service Law § 81) and the constitutional rights. Even though the statutory claim was raised at the District Court level, the panel failed to adjudicate this right and rendered a miscarriage of justice. see Hill (supra). Therefore, a miscarriage of justice would result if not considered by this court.

Your honor, the important purpose behind the 1964 Civil Rights Act or Title VII legislation is "to make persons whole for injuries suffered on account of unlawful discrimination" and "to bring quick resolution of the Title VII complaint. Albermarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). Here, the petitioner has suff-

ered significant amount of discrimination in employment from 1973 to until he was laid off in 1983 and significant retaliation dating from 1983 to the present time. Therefore, the petitioner humbly and respectfully prays this court to bring quick resolution of this case.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Second Circuit Court of Appeals.

Respectfully submitted

Bhupendra K. Shah

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

[Irrelevant material about data bases]

As a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 30th day of June, two thousand and nine.

PRESENT:

HON. AMALYA L. KEARSE,
HON. PETER W. HALL,
HON. DEBRA ANN LIVINGSTON,

Circuit Judges,

Bhupendra K Shah,

Plaintiff-Appellant,

v. No. 01-9009-cv

The New York State Department of Civil Service, New York State Office of Mental Health, Nathan Kline Institute of Psychiatric Research,

Defendants-Appellees.

For Appellant: BHUPENDRA K SHAH, *pro se*, Pearl River, New York

For Appellees: STEVEN WU(BARBARA D. Underwood, Solicitor General, Benjamin N. Gutman, Deputy Solicitor General, Diana R.H. Winters, Asstt. Solicitor General, *on the Brief*) for Andrew M. Cuomo, Attorney General of the State of New York, New York, New York.

UPON DUE CONSIDERATION, it is hereby ORDERED, ADJUDGED AND DECREED that the judgment of the district court is **AFFIRMED**.

Plaintiff - Appellant Bhupendra K Shah, pro se, appeals from the judgment of the United States District court for the Southern District of New York (Patterson, J.), granting summary judgment to Defendants on Plaintiff's claim of retaliation in violationof Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq. We assume the parties familiarity with the facts and procedural history.

Plaintiff has filed a number of suits and appeals claiming employment discrimination by defendants

dating back 1983. See *Shah v. State of New York*, 529 N.Y.S. 2d 442 (N.Y.Ct. Cl. 1988); *Shah v. New York State Office of Mental Health*, No. 133/88 (Sup. Ct. Rockland Co. 1989); *Shah v. Cancro*, No. 89 Civ. 0929 (S.D.N.Y. June 30, 1992); *Shah v. New York State Dep't of Civil Service*, No. 92 Civ 898 (S.D.N.Y. June 30,1992). In previous appeals in the district court action at issue here, we affirmed the district court's dismissal of many of Plaintiff's employment discrimination claims. see *Shah v. New York State Dep't of Civil Serv.*, 168 F. 3d 610,613 (2d cir. 1999). We determined, however, that Plaintiff had exhausted his retaliation claims against Nathan Kline Institute ("NKI") and remanded the case to the district court with respect to those claims only.[1]

We review orders granting summary judgment *de novo* See *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 300 (2d Cir. 2003). Summary Judgment is

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[1] Plaintiff has also asserted a disparate impact claim based on NKI's "word of mouth" hiring practice, and he contends that the district court erred in dismissing that claim after remand. However, any disparate claim had been previously dismissed and the dismissal was affirmed by our decision in Plaintiff's first appeals, which remanded only for consideration of Plaintiff's claims of retaliation. See *Shah*, 168 F. 3d at 613-15 (construing plaintiff's claim 8 and 9 as "alleging retaliation by NKI and remanding "for

appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as matter of law. *See id.* The burden of proof in retaliation claims follows the general disparate treatment analysis in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973). See, e.g., *Terry v. Ashcraft*, 336 F.3d 128, 141 (2d cir. 2003). To make a prima facie case showing of retaliation, a plaintiff must adduce evidence that : (1) he engaged in a protected activity; (2) the employer was aware of the protected activity; (3) the employer took adverse action; and (4) a causal connection exists between the protected activity and the adverse action i.e., that a retaliatory motive played a part in the adverse employment action. See *Distasio v. Perkin Elmer Corp.* 157 F. 3d 55, 65-66 (2d Cir. 1998). Once a prima facie case is established, the burden of production shifts to the defendants to provide non-retaliatory, legitimate business reason for the alleged retaliatory employment action. See. *Ranio v. Bratton*, 243 F. 3d 610, 625 (2d Cir. 2001). If the employer meets this burden of production, the

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further proceedings with respect to those claims.... "). None of the claims whose dismissal was affirmed on the prior appeal could be relitigated; nor may their dismissal properly be reargued on this appeal.

burden shift back to the plaintiff, who must demonstrate that the employer's reason was a pretext of retaliation. See id.

Plaintiff failed to present a prima facie case of retaliation. Although Plaintiff engaged in protected activity by filing his February 1990 discrimination complaint with the New York State Division of Human Rights ("DHR") and the Equal Employment Opportunity Commission ("EEOC"), and the Defendants knew of that filing, Plaintiff failed to proffer evidence of the requisite causal connection between NKI's actions and his protected activity. There was no direct evidence of retaliatory intent. Nor was there circumstantial evidence from which such intent could be inferred. The earliest of the purported adverse actions-failure to appoint Plaintiff to the position of Dr. Virginia Hannon upon here early retirement, or after abolishing that position, failure to create a position for plaintiff - came over one year after he filed his discrimination claim. Similarly, Dr. Josef Vitrai, Dr. Dave O'Neill, and Douglas Malyzek were hired well over 3 years after the DHR and EEOC complaints were filed. No inference of retaliatory animus is available from the adverse employment decision when there has been such a large gap of time between the protected activity and that

decision. See *Burkybile v. Bd. of Educ. of Hastings-on the Hudson Union freee Sch. Dist.* 411 F.3d 306, 314 (2d Cir. 2005).

Defendants moreover, provided non- retaliatory, legitimate business reasons for each of their employment decisions, and Plaintiff provided insufficient evidence that those proffered reasons were not credible and were a pretext for retaliation. Accordingly, Plaintiff has failed to satisfy his burden to raise a material issue of fact as to whether Defendant's actions were a pretext for a retaliatory motive. See *De La Cruz v. New York City Human Resources Admin. Dep't of Social Serv.*, 82 F.3d 16, 20 (2d Cir. 1996).

We have reviewed Plaintiff's remaining arguments and find them to be without merit For the reasons states above, the judgment of the district court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

Sd. ————————

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BHUPENDRA K SHAH
Plaintiff
-against-

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, NEW YORK STATE OFFICE OF MENTAL HEALTH, NATHAN KLINE INSTITUTE FOR PSYCHIATRIC RESEARCH,
Defendants.

94 Civ. 9193 (RPP)
OPINION AND ORDER.

ROBERT P. PATTERSON, JR., U.S.D.J.

Defendants New York State Department of Civil Service, New York State Office of Mental Health ("OMH") and Nathan Kline Institute for Psychiatric Research ("NKI") ("Defendants") move for an order pursuant to Federal Rule of Civil Procedure ("Fed R. Civ. P.") 56 granting summary judgment in favor of defendants. Plaintiff pro se Bhupendra K Shah ("Plaintiff") opposes the motion, and without notice of motion, requests that summary judgment be entered on his behalf. For the following reasons, Defendants' motion is granted and Plaintiff's request is denied.

BACKGROUND

I. Procedural History

On December 22, 1994, Plaintiff filed a complaint in this action, alleging employment discrimination and retaliation in violation of inter alia, Title VII of the Civil rights Act of 1964, 42 U.S.C. § 2000e et seq (2000) ("Title VII"). Defendant NKI is a research facility operated under the auspices of Defendant OMH. Plaintiff was employed by NKI as a research scientist from 1973 until 1983, when his employment was terminated as part of widespread layoffs.[1]

[1] The present action is one of the series of proceedings in which Plaintiff challenged his 1983 termination and the subsequent failure of OMH and NKI to rehire him. See, e.g., Shah v. State, 529 N.Y.S. 2d 442 (N.Y.Ct. Cl. 1988) (dismissing Civil Service Law challenge to the 1983 layoffs); Shah v. N. Y. State Office of Mental Health. No. 133.88 (N.Y. Sup, Ct. Rockland Co. 1989) (refusing to overturn state agency's dismissal of claim of discharge on the basis of race and national origin); Shah v. Cancro, No. 89 Civ. 0929 (CLB) (S. D. N. Y. May 15, 1989)(dismissing on statute-of-limitations grounds claim brought under 42 42 U.S.C. §§ 1981, 1983, and 1985, and state law), aff'd 891 F. 2d 278 (2nd cir. 1989) (table); Shah v. State, No. 76165 (N.Y. St. Cl. Sept 30. 1992)(dismissing contract challenge to the 1983 layoffs), aff'd 622 N.Y.S.2d 365 (N.Y.Div. 3d Dept. 1995).

In 1992, Plaintiff commended an action in the district court alleging that OMH discriminated against him in 1990 by refusing to hire him for the position of Director of Quality

Plaintiff filed the present action on December 22, 1994, alleging that Defendants had engaged in a pattern of discrimination against him in hring, promotion, layoffs, and reinstatement, spanning a period of more than twenty years. Plaintiff's Second Amended Complaint, filed on March 1995, also alleged that : (1) Plaintiff 1983 termination resulted from NKI's "illegal activities" (Second Am. Compl. dated Feb 10, 1994 ("Second Am. Compl.") ¶ 6.4); (2) OMH discriminated against him on the basis of race and national origin in rejecting his application for the position of Director of Assurance ("DQA") in 1990 (Id. ¶11); and (3) three refusals by NKI to hire between 1989 and 1994 were retaliatory (id. ¶¶ 8,9).

Assurance ("DQA"). Plaintiff complaint in that action was initially dismissed on statute-of-limitations, res judicata, and collateral estoppel grounds, and for deficient pleading, but he was given leave to replead. See Shah v. N. Y. State Dep't of Civil Service., No. 92 Civ. 898 (GLG) (S.D.N.Y. June 30, 1992). Plaintiff's amended complaint was dismissed in part on grounds of eleventh Amendment immunity and in aprt for failure to state a claim on which relief could be granted. See Shah v. N. Y. State Dep't of Civil Service., No. 92 civ. 898 (GLG) (S.D.N.Y. Nov. 19, 1992); Shah v. N.Y. State Dep't of civil Service., No. 92 Civ. 898 (GLG) (S.D.N.Y. Nov. 19, 1992) ; Shah v. N.Y. State Dep't of Civil Service., No. 92 Civ. 898 (GLG) (S.D.N.Y. March 8, 1993), The court of appeals affirmed the dismissals. See Shah v. N.Y. State Dep't of civil Service., 17 F. 3d 390 (2d Cir. 1993) (table).

In the Opinion and Order dated January 16, 1996 (the "January 1996 opinion"), all of the Plaintiff's allegations other than his claims pursuant to Title VII that OMH had discriminated against him on the basis of race and national origin in rejecting his application for DQA position were dismissed pursuant to Fed. R. Civ. P. 12(b)(6). See Shah v. N.Y.State Dep't of Civil Serv., No. 94 Civ. 9193 (RPP), 1996 WL 19021 (S.D.N.Y. Jan 17, 1996). In an Opinion dated December 9, 1997, Defendants' motion for summary judgment was granted dismissing the remaining claim. See Shah v. N.Y. State Dep't of Civil Serv., No. 94 Civ. 9193 (RPP), 1997 WL 769565 (S. D. N. Y. Dec. 10, 1997). On January 9, 1998, Plaintiff filed a Notice of Appeal.

On appeal, the Second Circuit reversed this Court's January 1996 Opinion on the issue of dismissal of Plaintiff's claims of retaliation against NKI in the Second Amended Complaint ("Claims 8 and 9) only. See Shah v. N.Y. State Dep't of Civil Serv., 168 F. 3d 610 (2d Cir. 1999). The January 1996 opinion had dismissed for lack of jurisdiction Plaintiff's claim 8 and 9 because Plaintiff's retaliation claims had not been presented to the New York State Division of Human Rights ("DHR") and the Equal Employment Oppurtunity Commission ("EEOC") and the Court held that they

were not reasonably related to the claims of discrimination in the complaint Plaintiff had filed on February 22, 1990, with the EEOC/DHR. See Shah, 1996 WL 19021, at *5-6. The Court of Appeals held that Plaintiff's allegations of retaliation based on denials of employment in 1991 and 1994 by NKI could be reasonably related to his allegations of employment discrimination in his 1990 administrative complaint to the DHR/EEOC See Shah, 168 F.3d at 614. The Court of Appeals otherwise affirmed this Court's judgment. Id at 615.

On remand, discovery was reopened to provide with information and documents concerning NKI's employment practices and hiring during 1991-1994 period. On November 9, 2000, Defendants moved with supporting affidavits and memorandum of law for an order pursuant to Fed. R. Civ. P. 56 granting summary judgment. On December 7, 2000, Plaintiff filed a memorandum of law in opposition with supporting affidavits and exhibits. Without notice of motion, Plaintiff also requested the summary judgment be entered on his behalf. On December 21, 2000, Defendants filed a reply memorandum of law in support of the motion with supporting affidavits. By memorandum endorsement dated December 26, 2000, the Court granted Plaintiff's request to file sur-reply in opposition

to the motion, which Plaintiff filed with a supporting affidavit on January 4, 2001. By memorandum endorsement dated January 5, 2001, the court granted Defendant's request to a new allegation made by Plaintiff in his sur-reply, and Defendants filed an affidavit in in response on January 12, 2001. On January 23, 2001, Plaintiff filed an affidavit in further opposition.

II. Facts[2]

Plaintiff is a nonwhite male who was a research scientist with a civil service specialty in Biometrics at NKI for months in 1973 and from 1974 until he was laid off from that position in 1983 as part of massive layoff at the institute. (Defs. 'Statement Pursuant to local Civil rule 56.1 ("Defs.' 56.1") ¶1.) Defendants New York State Department of Civil Service and OMH are New York State agencies. (Id. ¶2). Defendants NKI is a research

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[2]The facts set forth below are drawn from the parties statement of fact pursuant to E. & S.D.N.Y. Local Civil Rule 56.1 and the supporting affidavits and exhibits attached thereto. Pursuant to Rule 56.1, Defendants' statement are considered unless disputed by Plaintiff with citations to supporting evidence. E & S. D. N. Y. Loc. Civ. R. 56.1. additional facts are drawn from plaintiff's signed Second Amended Complaint, if not disputed Defendants with citations to supporting evidence.

facility operated under the aegis of OMH (Id. ¶3). On February 22, 1990, Plaintiff filed a verified complaint with the New York State Division of Human Rights and Equal Employment Opportunity Commission ("DHR/EEOC") alleging that he was denied a position at NKI of Director of Quality Assurance ("DQA") on the basis of his national origin. (Id. 3[3]; Aff. of Bhupendra K Shah dated Nov. 29, 2000 ("Shah Aff.") Ex. 3-A.) Plaintiff claims that Defendant NKI's non-hiring him as a research scientist in the period of 1991 through 1994 constitutes retaliation in violation of Title VII for his filing of his 1990 complaint with the DHR/EEOC. Plaintiff claims that he is qualified for a position as a research scientist in the specialties of Biometrics, Biostatistics and Epidemiology. (Defs.' 56.1 ¶9.) Plaintiff also claim he is qualified to work in the areas of computer science and nuclear medicine. (Rosenzweig Aff. Ex. F at 19.)

NKI's manner of Hiring Research Scientists

In the early 1990s, NKI's manner of hiring research scientists was "non-competitive." (Aff. of

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[3] Defendants' Statement Pursuant to Local Civil rule 56.1 contains two paragraphs number 3. This citation is to the second paragraph numbered 3.

Michael Kohn dated Nov. 7, 2000("Kohn Aff." ¶ 6.) NKI did not hire to fill budgeted positions. Instead, a project leader or Division chief would advise a "search committee" of the need to hire a research professional possessing certain attributes when a project or research study so required. (Id. ¶ 3.) The search committee was comprised of NKI division chiefs and other specialists. (Id. ¶ 2.) On many occasions, the person making the request would have a specific scientist or researcher in mind, based upon familiarity with that candidate's record of accomplishment in the specific area of interest. (Id. ¶ 3.) A justification for hiring, called a "Request to Fill" ("RTF"), which included a synopsis of the project and the proposed hire's responsibilities, would be submitted to OMH and the New York state Division of the Budget. (Id. ¶4) The recommendation of a specific scientist by the project leader and/or the Division chief was given great deference. (Id. ¶6.) Once a decision to pursue an individual was made, Dr. Cancro, the director of NKI, would be advised, and if he approved, that individual would be contacted. (Id.) When no candidate was suggested, an advertisement in a peer journal would be used to recruit candidates. (Id. ¶ 7.)

Upon his or her hiring at NKI, every research

scientist was required to designate a civil service specialty which most closely approximated the type of research he or she was to do.(Aff. of sylvia Portnoy dated Nov. 7, 2000 ("Portnoy Aff.") ¶ 4.) During the 1991-1994 period, specialty designations were initially arrived at by a joint decision of the scientist and his or her Division Chief from the list of Office of Mental Health Approved Specialties. (Aff. of Robert J Allen dated Jan. 11, 2001) ("Allen Aff.") ¶ 5.) The Office of Mental Health's list of approved Specialties was determined by the New York Department of Civil Service. (Portnoy Aff. ¶ 4 and Ex. A.) Each fall, a scientist was required to review his or her civil service specialty designation, and if he or she believed his or her field of research had changed, a new specialty designation from the approved list had to be requested by the scientist (Id.) This request had to be countersigned by the research's Division chief and then was considered for approval by a Peer Review Committee. (Id.)

NKI's Hiring (1991-1994)

In 1991, NKI did not hire any research scientists. (Id. ¶ 5.) However, on March 29, 1991, Dr. Virgina Hannon, whose title was Principal Research

Scientist-Psychology, retired from NKI.[4] (Aff. of Sylvia Portnoy dated Dec. 20, 2000 ("Portnoy Reply Aff.") ¶5.) Dr.Hannon retired pursuant to a retirement incentive, after which Dr. Hannon's position was abolished. (Id.) Early retirement was offered as part of a state plan to reduce the workforce through early retirement incentives and Dr. Hannon's job was abolished so that NKI would enjoy a budgetary reduction. (Aff. of Dr. Robert Cancro dated Dec. 18, 2000("Cancro Aff.) ¶5; see also Portnoy Reply Aff. ¶5.) In 1992, NKI hired two research scientists, neither of whom had a civil service specialty of Plaintiff's claimed specialities of Biometrics, Biostatistics, or Epidemiology.) (Def's 56.1 ¶6.)

In 1993, NKI hired four research scientists, one

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[4] Plaintiff submits an excerpt from the New York State Department of Mental Hygiene Division of Research 1975 Annual Report, which in an "Abridged Curricula Vitae of SeniorStaff' identified Dr. Hannon as "Principal Research scientist, Epidemiology Dept." at NKI (then called the Rockland Research Institute). (See Aff. of Bhupendra K Shah dated Dec. 28, 2000 Ex 30.) Plaintiff asserts that Dr. Hannon's civil service specialty was therefore Epidemiology. However, Plaintiff does not submit any evidence identifying Dr. Hannon's civil service specialty in 1975 or any evidence to show that Dr. Hannon's specialty at the time of her retirement in 1991 was not psychology.

of whom, Dr. Josef Vitrai, identified his civil service specialty as Biometrics.[5] (Id. ¶ 7.) Dr. Vitrai was specifically recruited to participate in a research protocol at NKI. (Kohn Aff. ¶ 9.) Dr. Vitrai is an experienced scientist with a record of accomplishments in the field of electroencephalography. (Defs.' 56.1 ¶10.) The justification of hiring Dr. Vitrai, as described in the "Request to Fill" which included a synopsis of the project and Dr. Vitrai's responsibilities, stated that the position was for an experienced data management expert and statistician who had a background in research concerning violence, psychopharmacology and treatment refusal (Id. ¶ 13.) None of the other scientist hired in 1993 identified their civil service specialty as Biometrics, Biostatistics or Epidemiology. (Defs.' 56.1 ¶7.)

In 1994, NKI hired twenty-one research scientists, one of whom, Dr. Dave O'Neill, identified his

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[5] Plaintiff points out that Dr. Vitria's Curriculum Vitae states that he worked at NKI in 1991-92, while Defendants claim Dr. Vitrai was not hired by NKI until 1993. (Pl's Mem. at 15.) Defendants respond that prior to his being employed at NKI, Dr. Vitrai was affiliated with the Research Foundation, a non-profit agency which is funded by grants from the federal government and other sources. (Portnoy reply Aff. ¶ 4.) Defendants state that employees of the Research Foundation are not employees of NKI or OMH. (Id.)

civil service specialty as Epidemiology. (Id. ¶ 8.) Dr. O'Neill obtained his position at NKI by responding to an advertisement in the April 1994 edition of Job openings for Economists, a publication of the American Economics Association, for an opening at NKI for Ph.D. level health economics with a strong economics background. (Id. ¶¶ 11, 14.) Dr. O'Neill was hired in October 3, 1994. (Aff. of Bhupendra K. Shah dated Jan 11, 2001 ("Shah 1/11/01 Aff., Ex. 35) The civil service list of Approved specialties does not include a designation for "economist" or "health economist." (See Portnoy aff. Ex. A.)

Also in 1994, NKI hired Mr. Douglas Malyszek, a research scientist who identified his civil service specialty as Biophysics.[6] (Rosenzweig Reply Aff. Ex. B) Mr. Malyszek was recruited by Joseph Helpern, Chief of the Division of Medical Physics and Director for the Center for Advanced brain Imaging at NKI, who was familiar

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[6]Plaintiff submits a document prepared by Defendants' Counsel that lists Mr. Malyszek's "Professional area" as "Medical Physics." (See Shah Aff. Ex. 1 at 4.) In his reply affidavit,Defendants'counsel explains that he prepared that document using the term "professional area" because that was how the employees' responsibilities were described to him, and that the list was not prepared utilizing the Department of Civil service list of Approved Specialties. (Rosenzweig Reply Aff. ¶4.)

with Mr. Malyszek's experience. (Aff. of Joseph A. Helpren dated Dec. 20, 2000 ("Helpren Aff.") ¶¶ 1, 4, 6.) Mr. Malyszek was hired to assist in installing three Magnetic Resonance Imaging ("MRI") units, two of which were experimental and had never been utilized before. (Id. ¶¶ 3-4.) Mr. Malyszek had technical experience in installing developmental research MRI units as well as expertise in research computing systems which allowed NKI to successfully install its units. (Id. ¶ 5.)

Plaintiff did not apply for the specific positions filed by Drs. Vitrai and O'Neill. (Defs' 56.1 ¶ 12.) However, in a letter dated July 19, 1993, Plaintiff did request consideration for a position in the Imaging Technology unit at NKI. (Shah Aff. Ex. 13) In response by letter dated December 17, 1993, Dr. Cancro wrote that "I have reviewed your qualifications and feel that other candidates better meet our needs for this new and highly-specialized research" in the Brain Imaging Unit at NKI. (Shah aff. Ex. 14.) Plaintiff also claims that on or about July 25, 1994, Plaintiff asked Dr. Cancro to rehire in any vacant position at NKI. (Second Am. comp. ¶10). Plaintiff alleges in his Second Amended Complaint that Dr. Cancro responded to his request that NKI rehire him in any vacant position by informing Plaintiff that " while we received three positions we lost. two positions

for a net gain of one." (Id.) Plaintiff also states that Dr. Cancro clarified his statement on September 19, 1994 stating that the one position was "dedicated to a senior research psychiatrist (M.D.) with experience in rehabilitation." (Id.)

When Plaintiff was at NKI, which was his only employment in a mental health setting, his position involved statistics and the development of statistical methods. (Def.s' 56.1 ¶ 16.) Plaintiff's resume indicates that he possesses a Ph.D. from Yale University in Statistics. (Shah Aff. Ex. 23.) While employed at NKI, Plaintiff "consult[ed] and collaborate[d] closely with many other elements at the Research Center in such area as computer analysis, EEG, serum level and pharmaco-kinetics ." (Id. Ex. 21.) Plaintiff has been retained by the New York Institute for Medical Research as a part-time consultant for analysis of electroencephamography data. (Pl.'s 56.1 Statement (Pl.'s 56.1") ¶ 8, Shah Aff. Ex. 22.) Defendants assert, and Plaintiff denies, that there is nothing in Plaintiff's resume to indicate that he possesses the credentials, training or experience required for the positions of Dr. Vitrai, Dr. O'Neill or Mr. Malyszek. (Def. 56.1 ¶15.) Plaintiff asserts that his education, experience and training support that he was qualified for research positions in Biometrics, Biostatistics and Epidemiology. (Pl.'s 56.1 ¶10.)

DISCUSSION

I. Standard of Summary Judgment

Summary Judgment may not be granted unless "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show there is no genuine issues as to any material act and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "[The] burden is upon the moving party to demonstrate that no genuine issue respecting any material fact exist." Gallo v. Prudential Residential Servs. 22 F. 3d 1219, 1223 (2d Cir. 1994). "[A]ll ambiguities must be resolved and all inferences drawn in favor of the party against whom summary judgment is sought." Id. "[T]he moving party may obtain summary judgment by showing that little or no evidence may be found in support of the nonmoving party's case." Id. at 1223-24. "When no rational jury could find in favor of the nonmoving part because the

evidence to support its case is so slight, there is no genuine issue of material fact and a grant of summary judgment is proper." Id. at 1224.

II. Application

Defendants move for an order pursuant to Fed. R. Civ. P. 56 granting summary judgment. Plaintiff opposes the motion and requests summary judgment be entered on his behalf. Plaintiff claims that Defendant NKI's non-hiring of his in the period of 1991 through 1994 constitutes retaliation in violation of Title VII for his filing of the 1990 complaint with the DHR/EEOC. Specifically, Plaintiff alleges that in 1991, when NKI was filling several positions, it did so without advertising or announcing the openings; that NKI used word-of-mouth solicitation of applicants in order to avoid receiving applications from qualified minority candidates; that one of those positions was given to a person whose specialty was similar to Plaintiff's; and that the avoidance of Plaintiff was "a retaliatory act." (Second Am. Comp. ¶9.) Plaintiff further alleges that NKI received funding for several new positions for the fiscal year 1994-95, and that Plaintiff asked NKI to hire him for any vacant position, but that NKI proceeded to mis- represent to Plaintiff

the number of new positions it had received, that it misdescribed the qualifications needed for any position it would fill, and that its refusal to rehire him was retaliatory. (Id. ¶¶ 9-10.) Plaintiff contends that there were four positions for which he was qualified, which are a position formerly held by Dr. Virginia Hannon which was eliminated upon her retire- ment in 1991, and the positions of Drs. Vitrai and O'Neill and by Mr. Douglas Malyszek.

Section 704(a) of Title VII provides in pertinent part:

> It shall be an unlawful employment practice for an an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this sub chapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Chapter.

42 U.S.C. § 2000e - 3(a) (2000).

To establish a prima facie case of retaliation under Title VII, a plaintiff must show that: "(1) [he] was engaged in any activity protected under Title VII; (2) the employer was aware of plaintiff's participation in the protected activity; (3) the employer took adverse action against plaintiff; and (4) a causal connection exist between the plaintiff's protected activity and the

action taken by the employer." Raniola v. Bratton, 243 F. 3d 610, 624 (2d cir. 2001) (quoting Gordon v. New York City Bd of Educ., 232 F.3d 111, 116 (2d Cir. 2000)). For retaliation claims arising in the failure-to-hire context, the Ninth Circuit court of Appeals has held that the adverse action element "requires a plaintiff to show that the position for which she applied was eliminated or not available to her because of her protected activities." Ruggles v. Cal. Polytechnic State Univ., 797 F. 2d 782 (9th cir. 1986). The "'adverse employment decision ' is the closing of the job opening to [plaintiff] and the loss of opportunity even to compete for the position." Id. Thus "in the failure - to - hire context involving a claim of retaliation, the plaintiff meets her prima facie burden by showing that 1) she engaged in protected activities, 2) the position was eliminated as to her, and 3) the position was eliminated as to her because of her protected activities." Id.

"Once a prima facie case of retaliation is established, the burden of production shifts to the employer to demonstrate that a legitimate, non- discriminatory reason existed for its action." Raniola, 243 F.3d 625 (citing Sumner v. U.S. Postal Serv. 899 F. 2d 203, 209 (2d Cir. 1990)). Once the defendant articulates a legitimate nondiscriminatory reason for the alleged retalia-

tion, the burden returns to the plaintiff to establish through either direct or circumstantial evidence, that the employer's action was, in fact, motivated by discriminatory retaliation. Id. A plaintiff may establish a Title VII violation even when a retaliatory motive is not the sole cause of the adverse employment action. Id. Retaliatory motive must be, however, at least a "substantial" or "motivating" factor behind adverse action. Id. (citations omitted). A plaintiff may prove that retaliation was a "substantial" or "motivating" factor behind an adverse employment action either: "(1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by defendant." Id. (quoting Gordon, 232 F.3d at 117).

A. Plaintiff's Prima Facie Case.

With regard to the first two elements of the prima facie case, it is clear that Plaintiff engaged in protected activity by filing a complaint on February 22, 1990, with the DHR/EEOC. (Shah Aff. Ex. 3-A.) Additionally, NKI has previously conceded that it was aware of Plaintiff's administrative complaint against itself and

OMH charging violation of Title VII. See Shah, 168 F.3d at 614. Accordingly, Plaintiff has established the first two elements of the prima facie case.

As to the third and fourth element, however, Defendants argue that Plaintiff has failed to establish a prima facie case of retaliation under Title VII because: (1) no research scientist was hired by NKI in 1991; (2) Plaintiff cannot demonstrate that NKI's failure to hire him in 1994 was retaliatory because there was too long a lapse in time between the 1990 complaint and 1994; (3) Plaintiff does not claim that he applied for the jobs that were filled by Drs. Vitrai and O'Neill; and (4) Plaintiff cannot show that he was qualified to perform the duties required for the positions he claims he could have filled. Thus Defendants contend that Plaintiff has not shown an adverse employment action or causation. In response, Plaintiff contends that he has shown both adverse employment action and causation.

1. Alleged Retaliation in 1991

Plaintiff claims that in 1991, when NKI was filling several positions, it did so without advertising or announcing the opening; that NKI used word-of-mouth solicitation of applicants in order to avoid receiving

applications from qualified minority candidates; that one of those positions was given to a person whose specialty was similar to Plaintiff's; and that the avoidance of Plaintiff was "a retaliatory act."[7] Second Am. Compl. ¶ 9.) With respect to Plaintiff's claim that

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[7] Plaintiff argues that Defendants' practice of non-competitive hiring results in an "adverse impact" on minorities, and that Defendants have accordingly violated the participation clause of Title VII. (Pl.'s Mem. at 13-14, 18-19.) In Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971), the Supreme Court construed Section 2000e-2(a) of Title VII to proscribe "not only overt discrimination but also practices that are fair in form but discriminatory in practice." See Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 645 (1989). "Under this basis for liability, which is known as the 'disparate-impact' theory . . .a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate that is required in a 'disparate treatment' case. " Id. at 646-46. Here, however, Plaintiff's claim arises under Section 704(a) of Title VII (codified at 42 U.S.C. § 2000e-3(a)). Section 704(a) of Title VII prohibits discrimination because of an employee's engaging in protected activity. Plaintiff's argument is based on the impact of Defendants' hiring practices on minorities, i.e., discrimination because of an employee's race, color or national origin. In a disparate impact case, a plaintiff "must identify the correct population for analysis." Smith v. Xerox Corp., 196 F.3d 358, 368 (2d cir. 1999). Here, assuming that disparate impact theory NKI filled positions without advertisement or applied to Section 704(a), the correct population for comparison would be employees or former employees who have engaged in protected activity as compared to those who have not.

announcing the openings, Defendants do not deny that NKI's hiring in the early 1990s was primarily "non-competitive"[8] (Kohn Aff. ¶ 6), although the position filled by Dr. O'Neill[9] was advertised in April 1994 (Defs' 56.1 ¶ 14). Defendants assert, however, and plaintiff does not deny, that contrary to Plaintiff's

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Plaintiff offers no evidence of disparate impact of Defendants' hiring practices on employees who have engaged in protected activity as compared to those who have not. Accordingly, Plaintiff's disparate impact argument does not apply.

[8] Defendants' non-competitive hiring process is presumably in accordance with New York Civil Service Law, however, if it is not, that would be the subject of another law suit since there is no showing that Defendants adopted the non-competitive hiring process in order to discriminate or retaliate against Plaintiff.

[9] Plaintiff argues that since the advertisement for Dr. O'Neill's position was for an economist, but Dr. O'Neill's specialty was Epidemiology, there was an unadvertised position for which Plaintiff had no opportunity to compete in Epidemiology. Defendants asserts that the reason Dr. O'Neill did not have a civil service specialty of economics is that there was no such specialty designation. In any case, Plaintiff applied for any vacant position prior to Dr.O'Neill's being hired on October 3, 1994, and due to the long history of litigation in this case, Defendants were on notice that Plaintiff wished to be considered for any position at NKI for which he was qualified. Accordingly, Plaintiff's application was pending for the position to which Dr. O'Neill was hired.

allegation, no research scientists were hired in 1991. Plaintiff's claims that the elimination of the position formerly held by Dr. Hannon upon her retirement in 1991 was a retaliatory act. Because Dr. Hannon's position was abolished, Plaintiff did not have an opportunity to compete for the position and it was closed therefore closed to him. Accordingly elimination of Dr. Hannon's position will be considered adverse employment action for the purposes of this summary judgment motion.

2. Alleged retaliation in 1994.

Plaintiff also alleges that NKI received funding for several new positions for the fiscal year 1994-95, and that Plaintiff asked NKI to hire him for any vacant position, but that NKI proceeded to misrepresent to Plaintiff the number of new positions it had received, that it misdescribed the qualifications needed for any position it would fill, and that its refusal to rehire him was retaliatory. (Second Am. Comp. ¶ 10.) In view of the long history of litigation, in this case in which Plaintiff has sought reinstatement or rehiring at NKI (see note, supra, at 2), there is enough evidence in the record for a jury to find that Defendants were on notice that Plaintiff wished to be considered for any position at NKI for which he was qualified. Accordingly, resolving

all ambiguities and drawing all inferences in favor of Plaintiff, the failure to rehire Plaintiff to the positions held by Dr. Vitrai, [10] Dr. O'Neill, and Mr. Malyszek will be considered adverse employment actions for the purpose of this summary judgment motion.

3. Adequate Qualifications

Defendants contend that Plaintiff has not shown that he is adequately qualified for the positions at NKI for which he claims discriminatory retaliation. "[A]dequate qualification for the job on the part of the complaining employee ... would seem to be almost indespensable to a Title VII violation." Williams v. Boorstin, 663 F. 2d 109, 116 (D.C. Cir. 1980) ("Title VII imports no suggestion that the less qualified shall be favored over the more qualified simply by virtue of their connection with some protected antidiscrimination activity.")

Dr. Hannon

With respect to the position formerly held by Dr. Hannon, Plaintiff has not submitted any evidence that he is qualified for a position with the title Principal Research Scientist-psychology. Accordingly, Plaintiff

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[10] Dr. Vitrai was hired in 1993, rather than 1994.

has not established that he is adequately qualified for the position held by Dr. Hannon at the time the position was eliminated.

Dr. Vitrai

With respect to the position held by Dr. Vitrai, the Request to fill ("RTF") for that position states that "[a]s a data management expert and statistician, Dr. Vitrai serves as a full member of several clinical research teams exploring violence, psychopharmacology and treatment refusal ..."[11] (Kohn Aff. Ex. D.) The RTF also states that "[a]s a clinical electrophysiologist, Dr. Vitrai develops his own independent projects in the area of

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[11] Plaintiff argues that Dr. Vitrai is not adequately qualified for the position for which he was hired, since the RTF describes him "a data management expert and statistician," where as Dr. Vitrai's Ph.D. is in Biometrics. That argument by Plaintiff is undermined by the fact that Plaintiff claims that he is qualified for positions in Biometrics, Biophysics and Epidemiology (Pl.'s 56.1 ¶ 10) whereas his own h.D. is in Statistics. Dr. Vitrai appears to have been adequately qualified for the position since he was recruited and hired by NKI. Additionally, Dr. Vitrai's civil service specialty is Biometrics, which is the same field in which he earned his Ph.D. (Rosenzweig reply Aff. Ex. B.) "Biometrics" is defined as "the statistical study of biological observations and phenomena." Webster's Third New Int'l dictionary 218 (1986).

EEG and evoked potentials." (Id.) Plaintiff's resume indicates that he possess a Ph.D. from Yale University in Statistics. (Shah Aff. Ex. 23.) While employed at NKI, Plaintiff "consulted and collaborate[d] closely with many other elements at the Research Center in such areas as computer analysis of EEG, serum levels, and pharmocokinetics." (Shah Aff. Ex. 21.) However, plaintiff resume does not indicate that he is a clinical electrophysiologist. Although Plaintiff is a statistician, Plaintiff has not shown that he is adequately qualified for the position because he has not offered evidence to show that he is a clinical electrophysiologist.

Dr. O'Neill

The advertisement for the position held by Dr. O'Neill, which was published in the April 1994 edition of job opening for Economics was for a Ph.D. level health economist with strong econometric back-ground.[12] (Defs.' 56.1 ¶14.) After he was hired, Dr.

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[12] Plaintiff argues that Dr. O'Neill is not qualified for the positions for which he was hired since Dr. O'Neill's civil service specialty is Epidemiology, while his Ph.D. is in economics . "Epidemiology" is "a science that deals with the incidence, distribution, and control of disease in a population." Webster's Third New Int'l Dictionary 762 (1986). "Economics" is "a social science that studies the

O'Neill identified the civil service specialty that "most closely approximated" his area of research as Epidemiology. (Portnoy Aff. ¶ 4.) The Office of Mental Health's list of Approved Specialties does not contain listing for economist or health economist. (Id; see also Portnoy Aff. Ex. A.) Plaintiff claims he qualified for positions in the civil service specialty of Epidemiology. However, while Plaintiff possesses a Ph.D. in statistics from Yale University, he has offered no evidence that he possesses a Ph.D. in economics, which was required for the position. Therefore, Plaintiff has not shown that he possesses adequate qualifications for the position of health economist with the civil service specialty of Epidemiology.

Mr. Malyszek

With regard to the position held by Mr. Malyszek, Plaintiff argues that Dr. Cancro's December 17, 1993, letter stating that "I have reviewed your qualifications and feel that other candidates better meet our needs

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production, distribution, and consumption of commodities." Id at 720. As noted above, there is no civil service specialty for economics. (See Portnoy Aff. Ex. A..) Additionally, Plaintiff has submitted no evidence to show that Dr. O'Neill did not meet the requirements as listed in the advertisement for the position in Job Openings for Economists.

for this new and highly-specialized research" in the Brain Imaging Unit at NKI, is an admission that Plaintiff was qualified for a position as a research scientist in Nuclear Medicine. (Shah Aff. Ex. 14.) Dr. Cancro asserts that the letter is not a comment on Plaintiff's qualifications for such a position, however. (Cancro Aff.¶ 6.) In any case, the Request to Fill("RTF") for the position held by Mr. Malyszek states that "[t]he incumbent of this position will have a minium of five years experience in the operation of Magnetic Resonance Imaging (MRI) and Magnetic Resonance Spectroscopy (MRS) ...." (Portnoy reply aff. Ex. B.) Plaintiff has not introduced any evidence that he possesses experience in the operation of MRI or MRS. Accordingly Plaintiff has not established that he possessed adequate qualification for the position held by Mr. Malyszek.

4. Causation

Defendants also contend that due to the length of time between Plaintiff's 1990 complaint to DHR/EEOC and the 1994 hiring of David O'Neill, Plaintiff cannot show causation. While "[t]he plaintiff's burden at the beginning of the case is a light one, usually demanding only that the protected activity preceded the adverse action in order to satisfy causation requirement," with

respect to proving causation, however, there must be sufficient proximity of the protected activity to the alleged adverse action. Raniola. 243 F.3d at 624 (citing Grant 622 F.2d at 46). The Second circuit has held that "[t]he causal connection needed for proof of a retaliation claim 'can be established indirectly by showing that the protected activity was closely followed in time by the adverse action.'" Cifra v. Gen. Elec. co., 252 F.3d 205, 217 (2d Cir. 2001) (citing Reed v. A.W. Lawrence & Co., 95 F. 3d 1170 (2d Cir. 1996) and quoting Manoharan v. Columbia Univ. Coll. of Physicians & Surgeons, 842 F. 2d 590, 593 (2d cir. 1988)). In Cifra , the plaintiff was fired twenty days after the defendant learned that the plaintiff had hired an attorney to pursue the claim of gender discrimination and just three days after the plaintiff's attorney had written a letter to the defendant discussing the plaintiff's complaint of gender discrimination. Id. at 217. The Second Circuit reverse the district court's grant of summary judgment for defendant, finding that the facts on causation were sufficient to complete the plaintiff's prima facie case. Id. at 217-18. In Reed , the requisite connection "was shown . . . by, among other things, evidence that the time between the plaintiff's initial complaint and her discharge was a mere twelve days." Reed, 95 F.3d at 1178 (upholding findings in

favor of the plaintiff). In Quinn v. Green Tree Credit Corp. 159 F. 3d 759, 769 (2d Cir. 1998), the Second Circuit held that it was error to grant summary judgment dismissing the plaintiff's retaliation claim for lack of evidence of causal connection where her "discharge came less than two months after she filed a complaint with [defendant's] management and just ten days after she filed a complaint with the [state division of human rights]."

The Second Circuit "has not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and an allegedly retaliatory action."Gorman-Bakos v. Cornell Coop Extensin of Schenectady County, 252 F. 3d 545, 554 (2d Cir. 2001). In Gorman-Bakos, the Second circuit held that five months was not too long to support an allegation of causal connection a claim of retaliation and accordingly reversed the district court's grant of summary judgment. Id at 555. However, the passage of three months has been held by the Second Circuit to be too long to suggest a causal relationship between a complaint and the failure to provide good recommendation. See Hollander v. Am. Cyanamid Co., 895 F. 2d 80, 85-86 (2d Cir. 1990). One year has been

found by a district court to be too long to show causal connection between filing the EEOC complaint and termination. Castro v. Local 1199, Nat'l Health & Human Servs. Employees Union, 964 F. Supp. 719, 728 (S.D.N.Y. 1997). A period of three years has also been found by a district court to be too long to support causation. Lynk v. Henderson, No. 98 Civ. 2086 (MGC), 2000 WL 178859, at *4 (S.D.N.Y. Feb 15, 2000) (noting that "[i]t is not reasonable to infer that three years after plaintiff made an EEO complaint against persons at a different postal station, two supervisors chose to issue a Letter of Warning to punish plaintiff for that complaint"].

Here, none of the alleged retaliations closely followed Plaintiff's complaint to the DHR/EEOC alleging discrimination. Plaintiff complaint to the DHR/EEOC was dated February 22, 1990. More than one year elapsed between Plaintiff's complaint and the elimination of Dr. Hannon's position upon he retirement in March 1991. Almost three years elapsed between Plaintiff's complaint to the DHR/EEOC and the hiring of Dr. Vitrai in or after January 1993. More than four years elapsed between Plaintiff's complaint and the hiring of both Dr. O'Neill and Mr. Malyszek in the fall of 1994. Thus the shortest interval between Plaintiff's protected

activity and an alleged act of retaliation was more than one year, and the other alleged acts of retaliation occurred three and four years after Plaintiff's protected activity. Since none of the alleged acts of retaliation closely followed Plaintiff's protected activity, it is not reasonable to infer causation.

In sum, Plaintiff has failed to establish two of the essential elements of a prima facie case of retaliation in violation of Title VII for each of the positions for which he claims discriminatory retaliation. Specifically, Plaintiff has failed to establish both adequate qualifications and causation with respect to all four of the positions for which he alleges retaliation. Accordingly, Plaintiff has failed to establish a prima facie case of employment retaliation in violation of Title VII.

B. Defendants Nondiscriminatory Reasons

Defendants also argue that, even assuming Plaintiff could establish a prima facie case of employment retaliation, Plaintiff cannot satisfy the remaining elements of his claim, since Plaintiff cannot prove that Defendants' proferred non-discriminatory reasons for not hiring Plaintiff for the relevant positions are that the research scientists who were hired were more

qualified than Plaintiff in that they possessed skills which Plaintiff did not and which were required for those positions.

To that end, Defendants note that Dr. Vitrai had a record of accomplishments in the field of electroencephalography. (Kohn Aff. ¶¶ 8-9.) Dr. Vitrai's resume reveals that he has published several articles on the subject of electroencephalography. (Id. Ex. C.) Dr. O'Neill possessed the required Ph.D. in economics and had experience as a senior level member of a health research policy group. (Portnoy Aff. ¶ 8.) Mr. Malyszek had experience with the developmental Magnetic Resonance Imaging system which he was to assist in installing. (Helpern Aff. ¶¶ 2-5.)

Once the defendant articulates a- legitimate nondiscriminatory reason for the alleged retaliation, the burden returns to the plaintiff to establish, through either direct or circumstantial evidence, that the employer's action was, in fact, motivated by discriminatory retaliation. Raniola, 243 F. 3d at 625. The Supreme court has noted that a plaintiff "might seek to demonstrate that respondent's claim to have promoted a better qualified applicant was pretextual by showing that she was in fact better qualified than the person chosen for

the position." Patterson v. McLean Credit Union, 491 U.S. 164, 187-88 (1989).

Here, Plaintiff has not offered any evidence demonstrating that he was more qualified than those candidates actually hired by NKI. Plaintiff has not estabolished that he is either adequately qualified than Vitrai. Dr. Vitrai earned a Ph.D. in biometrics from university of Budapest. (Kohn Aff. Ex. C.) Dr. Vitrai has published several articles on the subject of electroencephalography. (Id.) Additionally, from 1988 through 1990 Dr. Vitrai was the deputy head of an EEG laboratory as Semmelweis Medical University in Budapest. (Id.) Plaintiff's experience in electroencephalography is that he has been retained by the New York Institute of Medical Research as a part-time consultant for analysis of electroencephalography data. Pl's 56.1 ¶ 8; Shah Aff.Ex.22) While at NKI, Plaintiff also consulted with other employees on computer analysis of EEG. (Shah Aff. Ex. 21) . However, this evidence does not show that Plaintiff was more qualified than Vitrai. Accordingly, Plaintiff has not introduced evidence to show that he was more qualified than Dr. Vitrai for a position in part as for a clinical electrophysiologist.

With respect to the position held by Dr. O'Neill, Plaintiff has not established that he is adequately qualified for that position since Plaintiff's resume indicates that he does not have a Ph.D. in economics, as does Dr. O'Neill. (Rosenzweig Aff. Ex. D.) Moreover, Plaintiff does not possess experience directing studies in the area of health policy, labor economics, or education, as does Dr. O'Neill, nor was a senior member of a health research policy group, as was Dr. O'Neill. (Kohn Aff. Ex. B.) Accordingly, Plaintiff has not introduced evidence to show that he is more qualified than Dr. O'Neill for a position that was advertised as for a Ph.D. level health economist with a strong econometrics background.

With respect to the position held by Mr. Malyszek, Plaintiff's resume indicates that he has "evaluated [the] efficacy of a Nuclear device measuring bone density of lumbar vertebrae." (Rosenzweig Aff. Ex. D.) However, Plaintiff's resume does not indicate that he has experience installing developmental research Magnetic Resonance Imaging systems as does Malyszek. (Id.) Accordingly, Plaintiff has not introduced evidence to show that he is more qualified than Mr. Malyszek for a position that required experience with MRI. In sum, Plaintiff has not offered any evidence that he was more

qualified than the candidates who were in fact hired at NKI for the positions for which Plaintiff claims retaliation.

With respect to the elimination of the position held by Dr. Hannon, Defendants asserts that their legitimate nondiscriminatory reason for the elimination of Dr. Hannon's job is that the position was abolished as part of a state plan to reduce the workforce through early retirement incentives. (Cancro Aff. ¶5.) Defendants state that once Dr. Hannon retired in March 1991, there was no budget item or position to fill because the position was abolished so that the facility would enjoy a budgetary reduction. (Id. see also Portony reply Aff. ¶ 5.) In fact, no research scientists were hired by NKI in 1991. (Defs.' 56.1 ¶ 5.) Plaintiff has not offered any evidence to the contrary. Accordingly, Plaintiff has not offered any evidence to demonstrate that the elimination of Dr. Hannon's position was pretextual.

With respect to direct evidence of retaliation intent or animus, in theSecond Amended complaint, Plaintiff claims that he had a conversation with Defendants' attorney sometime between March 1992 and December 1992, and that during that conversation Defendants' attorney " accidently revealed that defendant NKI

has refused to rehire you." (Second Am. Comp. ¶ 10) Although Plaintiff concedes that this statement was "concerning his [prior] civil rights action NO. 92 Civ 898 (GLG)." which alleged discrimination by OMH in refusing to hire him for the Director of Quality Assurance position. Plaintiff contends that this statement reveals evidence of discrimination and retaliation against Plaintiff. (Id.) However, NKI did not hire any research scientist in 1991 and hired no research scientists in any specialty designation for which plaintiff claims he is qualified prior to the statement by Defendants' counsel in 1992. More importantly, Defendant's counsel's statement does not reveal any retaliatory or discriminatory intent.

Additionally, Plaintiff claims that on September 19, 1994, Dr. Cancro misdescribed the qualifications required to be hired at NKI, stating that the only position available was "dedicated to a senior research psychiatrist (M.D.) with experience in rehabilitation." (Second Am. Compl. ¶ 10) The Request to Fill ("RTF") for Malyszek was dated September 22, 1994, three days after Dr. Cancro's statement. Mr. Malyszek does not possess a medical degree, nor does he appear to have experience in rehabilitation. Rather, Mr. Malyszek is a research scientist with the civil specialty of Biophysics

who has technical experience in installing developmental research Magnetic Resonance Imaging units and expertise in research computing systems. Presumably, plaintiff alleges that Dr. Cancro's misdescribing the required qualifications for this position shows discriminatory intent. Even if Dr. Cancro misdescribed the position for which Mr. Malyszek was hired, however, plaintiff does not possess adequate qualifications to perform the duties of either position, since he is neither a medical doctor nor is he experienced with the installation of developmental research units. Accordngly, Plaintiff has failed to establish pretext.

"Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that will bear the burden of proof at trial." Celotex Corp. 477 U.S. at 322. The Second Circuit has held that summary judgment on a plaintiff's claim of discriminatory denial of promotion is proper here plaintiff failed to put forth any evidence to suggest that the defendant's articulated non-discriminatory reasons that there were more qualified candidates were pretextual. Holt v. KML-Continental Inc., 95 F.3d 123, 129-30 (2d Cir. 1996). Here, Plaintiff has not proven causation or that he

possesses adequate qualifications for the positions for which he claims retaliation. Accordingly, Plaintiff has not established a prima facie case of retaliation under Title VII, upon which he will bear the burden of proof at trial. Even if Plaintiff were to establish a prima facie case of retaliation, Plaintiff has failed to put forth any evidence to show that Defendants' articulated legitimate non-discriminatory reasons that the candidates who were hired at NKI were more qualified than Plaintiff were pretextual or that the elimination of Dr. Hannon's position was pretextual. Likewise, Plaintiff has failed to introduce direct evidence sufficient to show retaliatory animus or intent. Since Plaintiff has failed to establish essential elements of a prima facie case of retaliation and has not introduced sufficient evidence to establish pretext, Defendants' motion for an order pursuant to Fed. R. Civ. P. 56 granting summary judgement in favor of Defendants is granted. Plaintiff request that summary judgment be entered on his behalf is denied.

CONCLUSION

For the foregoing reasons, Defendants' motion for an order pursuant to Fed. R. Civ. P. 56 granting summary judgment in favor of Defendants is granted.

Plaintiff request that summary judgment be entered on his behalf is denied.

IT IS SO ORDERED.

Dated New York, new York
July 24, 2001

Sd. Robert P. Patterson, Jr.
U.S.D.J.

Copies of this opinion and Order sent to:

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

As a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 8th day of October, two thousand and nine.

Before: AMALYA L. KEARSE,
PETER W. HALL,
DEBRA ANN LIVINGSTON,
Circuit Judges,

Bhupendra K Shah,

Plaintiff-Appellant,

v.

The New York State Department of Civil Service, New York State Office of Mental Health, Nathan Kline Institute of Psychiatric Research,

Defendants-Appellees.

ORDER
No. 01-9009-cv

Appellant Bhupendra K. Shah having filed a petition for panel rehearing and the panel that determined that appeal having considered the request,

IT IS HEREBY ORDERED that the petition be denied.

For the Court:
Catherine O'Hagan Wolfe clerk

By _____
Frank Perez, Deputy Clerk